No. 5272

In the

United States Circuit Court of Appeals

For the Ninth Circuit

FRANCIS H. HARDY
Appellant
vs.
NORTH BUTTE MINING COMPANY,
a corporation
Appellee

Upon Appeal from the United States District Court
for the District of Montana

Brief for Appellant

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STATEMENT OF THE CASE

This is a suit in the nature of a creditor's bill praying for the appointment of a receiver or receivers of the property of the defendant company, and for the appropriation of the assets of the company to the satisfaction and demand of the complainant and other creditors, complainant acting for himself and for all other creditors of the defendant company. Complainant is a simple creditor, but contemporaneously with the filing of the complaint an an-

swer was filed on behalf of the defendant company admitting the allegations of the bill and consenting to the appointment of receivers, thus bringing the case within the rule of *In re Reisenberg,* 208 U. S. 90, *Holins vs. Brierfield,* 150 U. S. 371, *Brown vs. Lake Superior Iron Company,* 134 U. S. 530.

Original proceedings of the same kind had theretofore been taken in the District Court of the United States for the District of Minnesota, Fifth Division, the present case being ancillary. The greater part of the property of the defendant company is located in Montana.

On June 10, 1927, an order appointing receivers was made herein by the Honorable John H. McNary, he having been designated to sit in the absence of the District Judges for the District of Montana. The receivers thereupon qualified and entered into the discharge of their duties. Both had theretofore been appointed and had qualified in the original suit in the District Court of the United States for the District of Minnesota, Fifth Division.

Thereafter and on July 7, 1927, there was presented in the proceeding a preliminary report of the receivers, together with a petition asking for confirmation of the steps thus far taken by the receivers, and for authority to withhold payment of interest about to fall due on certain obligations of the defendant company. Thereupon the District Court,

(Honorable George M. Bourquin sitting) upon his own motion, made and entered an order requiring that the parties show cause on July 13, 1927, why the order theretofore made appointing receivers should not be vacated and the suit dismissed. Complainant appeared at the time directed and made his showing. Thereafter and on July 25, 1927, the District Court (Honorable George M. Bourquin) handed down and filed an opinion accompanied by an order discharging the receivers and dismissing the suit. The case comes here upon appeal from this order.

ASSIGNMENTS OF ERROR

The District Court erred as follows:

1. In making and filing its order dated July 13, 1927, dismissing the suit and discharging the receivers herein.

2. In holding that the suit should be dismissed and the receivers discharged and in dismissing and discharging the same because the complaint is without equity, such holding being contrary to the facts and the law.

3. In holding that the suit should be dismissed and the receivers discharged and in dismissing and discharging the same because the complaint alleges no valid ground warranting the court to hold or operate defendant's mines, such finding being contrary to the facts and the law.

4. In holding that the suit should be dismissed and the receivers discharged and in dismissing and discharging the same because the complaint alleges no valid ground to impede any creditor in the prosecution of his claim, such holding being contrary to the facts and the law.

5. In holding that the suit should be dismissed and the receivers discharged and in dismissing and discharging the same because the consent of the defendant is sham and void upon its face, such holding being contrary to the facts and the law.

6. In holding that the suit should be dismissed and the receivers discharged and in dismissing and discharging the same because the complaint is wanting in substance and is too unreliable to justify the court to oust the corporate management and to take over and operate the properties, such holding being contrary to the facts and the law.

7. In holding that the suit should be dismissed and the receivers discharged and in dismissing and discharging the same because insolvency is not shown, such holding being contrary to the facts and the law.

8. In holding that the suit should be dismissed and the receivers discharged and in dismissing and discharging the same because there is nothing to warrant the court to hinder and delay creditors, such holding being contrary to the facts and the law.

9. In holding that the suit should be dismissed and the receivers discharged and in dismissing and discharging the same because the case is not bona fide and genuine litigation, such holding being contrary to the facts and the law.

10. In holding that the suit should be dismissed and the receivers discharged and in dismissing and discharging the same because corporations are not entitled to receivership save where persons would be, such holding being contrary to the facts and the law.

11. In holding that the suit should be dismissed and the receivers discharged and in dismissing and discharging the same because the suit lacks good faith and is collusive between the complainant and a faction of defendant corporation to gain some inequitable advantage and accomplish some ulterior purpose, such holding being contrary to the facts and the law.

12. In holding that the suit should be dismissed and the receivers discharged and in dismissing and discharging the same because of the comparatively small amount of complainant's claim, such holding being contrary to the facts and the law.

13. In holding that the suit should be dismissed and the receivers discharged and in dismissing and discharging the same upon all other grounds, if any, upon which the court based its decision in holding

that this suit should be dismissed, said holding being contrary to the facts and the law.

14. That the order is contrary to law.

15. In assuming and exercising authority to hear and determine the question of whether the complaint is without equity, such hearing and determination being in excess of the authority of said court, the question having been theretofore heard and determined by said court, another judge sitting, and said question being res judicata in said court.

16. In assuming and exercising authority to hear and determine the question of whether the complaint alleges valid grounds warranting the court to hold and operate the defendant's mines, such hearing and determination being in excess of the authority of said court, the question having been theretofore heard and determined by said court, another judge sitting, and such question being res judicata in said court.

17. In assuming and exercising authority to hear and determine the question of whether the complaint alleges valid grounds warranting the court to impede any creditor in the prosecution of his claim, such hearing and determination being in excess of the authority of said court, such question having been theretofore heard and determined by said court, another judge sitting, and such question being res judicata in said court.

18. In ordering the complainant to show cause why said suit should not be dismissed because the complaint is without equity and alleges no valid ground warranting the court to hold and operate the defendant's mines or impede any creditor in the prosecution of his claim, such order being in excess of the authority of said court, such question having been theretofore heard and determined by said court, another judge sitting, and such question being res judicata in said court.

19. In ordering, on the court's own motion, the complainant to show cause why his suit should not be dismissed, said order being in excess of the authority of said court.

20. In ordering, on the court's own motion, the complainant to show cause why his suit should not be dismissed, such order being an abuse of the discretion of said court.

21. In making and entering its order dismissing the complainant's suit, such order being an abuse of the discretion of the said court.

22. In making and entering its order dismissing the complainant's suit, such order being in violation of judicial comity.

ARGUMENT

The assignments of error, though numerous, present but two questions. The discussion which follows will therefore consider the assignments as grouped under the following heads and sub-heads:

1. The lower court lacked authority to make and enter its order of July 13, 1927, discharging the receivers and dismissing the suit. (This question is presented by assignments 1, 14, 15, 16, 17, 18 and 19.)

2. The lower court lacked justification and warrant for the order discharging the receivers and dismissing the suit assuming that said court had the necessary authority, because

(a) The bill of complaint is not wanting in equity. (Assignments 1, 2, 3, 4, 6, 7 and 8).

(b) The answer and consent of the defendant company is sufficient. (Assignment No. 5).

(c) The cause is not sham, is not lacking in bonafides, is genuine litigation, is not collusive, and the amount of plaintiff's claim is not a fact properly to be considered. (Assignments 5, 9, 11 and 12).

1. *The District Court was without authority to make and enter its order of July 13, 1927, discharging the receivers and dismissing the suit.*

As has already been explained, the action of the District Court (Honorable George M. Bourquin sitting) in discharging the receivers and dismissing

the suit was taken upon the court's own motion, after the same court (Honorable John H. McNary sitting) had accepted complainant's bill as sufficient and had appointed the receivers and approved their bond. No appearance was made in the case opposing the appointment of receivers, either at the time of their appointment, or subsequently at the time of the hearing of the order to show cause. The only questions presented by the order to show cause were such as could be raised upon the record; in effect, the order questioned the sufficiency of the complaint.

It is the contention of appellant that this question was res judicata in said court. The same question was of necessity presented to the court on June 10, 1927, when the complaint was presented to and considered by Judge McNary and at that time it was passed upon favorably to the complainant. At the time the matter was before the court on July 13th, there were no new questions before the court. There was no new data in the record upon which new questions could be raised. The only additions to the record between June 10 and July 13 were the preliminary report of the receivers and a petition asking for confirmation of the acts stated in said report, and such preliminary report disclosed in detail the insolvent condition of the defendant company, and in that respect supported the allegations of insolvency contained in complainant's bill. The situation

then was that on June 10th the court found that the complaint was sufficient, and on July 13th the same court, without any change in the situation, but with another judge sitting, found that it was not.

On both occasions the action was the action of the court. The only difference was in the personnel thereof. There is no question of the authority of Judge McNary to act. He was duly authorized to do so, and having acted, having passed upon the complaint and the sufficiency thereof, his act was the law of the case, and should have been so treated by any other judge sitting in the same case in that court.

See *Commercial Union of America, Inc., vs. Anglo-South American Bank,* 10 Fed. (2d) 937.

In the foregoing case the United States Circuit Court of Appeals, for the Second Circuit, passed upon a similar situation. As stated in the opinion, p. 938, "The situation presented therefore is this: that after one judge sitting in the case had decided the complaint to be sufficient, another judge sitting in the same court decided it was insufficient and dismissed it. We are not aware that it has ever before happened that in the Southern District of New York, or in any district within this circuit, one judge has in effect undertaken to set aside or ignore an order made by another judge of co-ordinate jurisdiction in the same suit," and it was held "that the decision made by Judge Mack was the law of the case

as established in the District Court, and should have been so treated by any other judge sitting in the same case in that court. Judges of co-ordinate jurisdiction, sitting in the same court and in the same case, should not overrule the decisions of each other."

To the same effect is *Appleton vs. Smith,* 1 Fed. Cas. 1075, Fed. Cas. No. 498, wherein Justice Miller, sitting as a circuit judge, said with relation to a similar situation:

> "Where, as in the present case, the motion is made on the same grounds and with no new state of pleadings or facts, it is nothing more than an appeal from one judge of the same court to another, and though it is my province in the Supreme Court to hear and determine such appeals, I have in this court no such prerogative. . . . It would be in the highest degree indelicate for one judge of the same court thus to review and set aside the action of his associate in his absence and might lead to unseemly struggles to obtain a hearing before one judge in preference to the other."

Also:

U. S. vs. Biebush, 1 Fed. 213.

Cole Silver Min. Co. vs. Va. & Gold Hill Water Co., 6 Fed. Cas. 72, No. 2990.

In the latter case, Justice Field sitting in circuit court, said:

> "I could not with propriety reconsider his (another circuit judge) decision, even if I differed from him in opinion. The circuit judge

possesses, as already stated, equal authority with myself in the circuit, and it would lead to unseemly conflicts if the rulings of one judge upon a question of law, should be disregarded or be open to review by the other judge in the same case."

In *Oglesby vs. Attrill,* 14 Fed. 214, the court said, on being asked to set aside a substituted service of process:

"I find that this question has been passed upon and adjudicated by the District judge sitting in this court in the early stage of this case. This decision is not open for review to any other judge sitting in this court in the same case."

In *Wakelee vs. Davis,* 44 Fed. 532, the court said:

"It is true that in deciding the issues presented by the demurrer the court spoke through another judge, but the law there enunciated is not merely the individual opinion of the judge who presided; it is the law of this court to be followed upon similar facts until a different rule is laid down by the Supreme Court."

In *Shreve vs. Cheesman,* 69 Fed. 785, 790, Judge Sanborn of the Circuit Court of Appeals said:

"It is a principle of general jurisprudence that courts of concurrent or co-ordinate jurisdiction will follow the deliberate decisions of each other, in order to prevent unseemly conflicts, and to preserve uniformity of decision and harmony of action. . . . Nor has it been thought less vital to a wise administration of justice in the Federal courts that the various judges who sit in the same court should not attempt to overrule the decisions of each other,

> especially upon questions involving rules of property or of practice, except for the most cogent reasons."

"One judge will not review the rulings of another in the same court." *Taylor vs. Decatur Co.,* 112 Fed. 449; and in *Plattner Implement Co. vs. International Harvester Co.,* 133 Fed. 376, the court said (Judge Sanborn):

> "But the rule itself (referring to it as a 'rule of comity and necessity'), and a careful observance of it, are essential to the prevention of unseemly conflicts, to the speedy conclusion of litigation, and to the respectable administration of the law, especially in the national courts, where many judges are qualified to sit at the trials, and are frequently called upon to act in the same cases. It is unavoidable that the opinions of several judges upon the many doubtful questions which are constantly arising should sometimes differ, and a rule of practice which would permit one judge to sustain a demurrer to a complaint, another of co-ordinate jurisdiction to overrule it and to try the case upon the theory that the pleading was sufficient, and the former to then arrest the judgment upon the ground that his decision upon the demurrer was right, would be intolerable. It has long been almost universally observed."

To this effect are:

U. S. vs. Rizzinelli, 182 Fed. 675, 678;

In re Alpern, 280 Fed. 432, 437;

Claflin vs. Furtich, 119 Fed. 429;

U. S. vs. Maresca, 266 Fed. 713.

In the latter case at page 724 the court said:

> "I have no more power to grant this motion than I would to issue an order to show cause why an order sustaining a demurrer to an indictment entered at the same time before another judge should not be vacated and held for naught."

The soundness of the rule stated in the above cases has been already recognized by this court in at least two instances—*Gardner vs. U. S.,* 13 Fed. (2d) 851 and *Presidio Mining Co. vs. Overton,* 261 Fed. 933.

In the latter case a bill for receivers having been declared insufficient by Judge Dooling, and the question being raised in a subsequent case before Judge Van Fleet, the court said:

> "The insufficiency of the original complaint thereupon became res judicata in the subsequent proceedings before Judge Van Fleet."

and cited a number of cases and quoted Justice Field's language in *Cole Silver Mining Co. vs. Virginia Gold Hill Water Co., supra,* as set forth above.

In view of the foregoing it would seem that the rule as above stated is a well established and recognized doctrine, and is directly applicable to the situation presented here.

The rule is based fundamentally upon the principle as stated by Justice Field, supra, that any other rule "would lead to unseemly conflicts or as stated by Justice Miller in the Appleton case, supra, to

"unseemly struggles", or as more fully set forth by Judge Dietrich in the *Rizzinelli* case, *supra,*

> "It is highly important to the orderly administration of justice that in the same jurisdiction there be uniformity of decision. Well considered precedents should be cast aside only for the most cogent reasons. The general rule which forbids judges sitting in the same court from ignoring for light reasons, the decisions of each other, does not have its origin merely in motives of personal courtesy, but as experience amply proves, rests upon consideration of a wise public policy. Any other course would tend to unseemly struggle in the courts, and would ultimately result in a weakening of public confidence in the soundness and finality of judicial decisions."

In this connection we would also call attention to the fact that the order from which this appeal is taken overrules the action of Judge McNary, a jurist of co-ordinate jurisdiction sitting in the same court, and, in addition, is contrary to the finding of Judge Cant, the United States District Judge for the District of Minnesota, who took action similar to that taken by Judge McNary upon a similar complaint and proceeding.

We are aware that the ruling and action of the United States District Court, for the District of Minnesota, Fifth Division, is not necessarily binding upon the United States District Court, for the District of Montana, and that the rule of comity between the Federal courts created no express obliga-

tion upon the Montana court in this regard, but nevertheless the action taken by a court of primary jurisdiction in receivership proceedings should have weight with and be given due consideration by a court of ancillary jurisdiction, in which the proceedings instituted are in aid of the jurisdiction of the primary court. But for the fact that in the instant case the primary and ancillary courts are located in different circuits, the ancillary proceedings in aid of the jurisdiction of the primary court would have proceeded largely as a matter of form, subject, of course, to the disapproval by the Circuit Court of Appeals as provided by Section 117,Title 28, U. S. Code. We contend that an order of a District Court which in effect reviews and overrules a decision of another United States District Court even though of another Circuit, and in addition reviews and overrules its own decision, presents a situation which, in an exaggerated form, tends to "ultimately result in a weakening of public confidence in the soundness and finality of judicial decisions" and that the action taken by the Minnesota court should not have been without weight with the Montana court.

In *Sands vs. E. S. Greeley & Co.,* 88 Fed. 130, in considering primary and ancillary receivership proceedings in different states, the court used the following language:

> "When such an application (ancillary) is made, the court to which it is addressed exercises its own original jurisdiction. The decree

> in the court of the domicile of the corporation is evidence in every other state that the corporation is insolvent and that a proper case exists in that state for the appointment of a receiver, and it is to be respected accordingly in obedience to the constitutional provision whereby full faith and credit is to be given in each state to the records and judicial proceedings of every other state of the Union."

And in *Walker vs. United States Light & Heating Co.,* 220 Fed. 393, Judge Hand (citing *Sands vs. Greeley, supra*) said:

> ". . . The adjudication in the other (primary) suit that receivers should be appointed, made with the consent and at the request of the defendant corporation, amounts, I think, to a decree had upon the complaint instituted by a creditor, who had no judgment, for the benefit of all other creditors, to the effect that the case was a proper one for a determination of all claims by a court of equity and that a receiver was necessary. . . . Accordingly, I think the necessity and propriety of the relief herein asked for has already been adjudicated in the Western district of New York. . . . "

The principle thus announced would, we apprehend, have equal applicability to decisions between Federal courts of different jurisdictions, and that, in consequence, the decision and action of the United States District Court of Minnesota was and is evidence that the corporation is insolvent, and that a proper case for receivership exists in the Minnesota District. It should be borne in mind, too, that an ancillary proceeding is in aid of a primary suit, and

that comity dictates that such aid should be extended wherever proper.

The appellant believes that beyond question the foregoing rule disposes of this appeal, but, if it is held that a judge of the lower court had authority to overrule another judge of the same court, then, appellant contends that

2. *The District Court lacked justification and warrant for dismissing the suit and discharging the receivers.*

A consideration of this question requires an examination of the order to show cause upon which the final order dismissing was based, and the reasons assigned by the court for its final action.

The order to show cause read as follows:

> "Herein, it appearing to the court that the bill of complaint is without equity, that no valid ground is alleged which warrants the court to engage in operating mining property of defendant as it now is, or to impede any creditor in collection of any his claim, it is ordered that on July 13, 1927, at 9:30 A. M., the parties show cause, if any they have,
>
> (1) Why the order heretofore made appointing a receiver be not vacated for that it was mistakenly and improvidently made, or/and
>
> (2) Why the receivership should not end and the suit be dismissed forthwith.
>
> July 9th, 1927.
>
> BOURQUIN, J."
>
> "Filed July 9, 1927.
> C. R. Garlow, Clerk."

Obviously this was a double order. The court had in contemplation two possible actions:

First—the vacation of the order of Judge McNary made June 10th;

Second—the dismissal of the suit and the end of the receivership.

These two possibilities differed widely in their effect. If the order finally made vacated the order of June 10th, it would have been a finding that the receivership never properly existed, and the acts of the receivers would have been without warrant at law. If the order finally made terminated the receivership, it was a recognition of the existence and of the authority of the receivers to act while they did act. The court upon consideration of the order to show cause did not vacate the order of June 10th, but made an order dismissing the suit and discharging the receivers.

The reasons assigned, and the questions raised by the order to show cause are likewise clearly divisible.

1*st*. As to an order vacating the court stated that it appeared

a. That the bill of complaint is without equity;

b. That no valid ground is alleged, which warrants the court to engage in mining operations;

c. That no valid ground is alleged which warrants the court to impede any creditor in the collection of his claim;

d. That the order of June 10th was improvidently and mistakenly made.

2*nd*. As to an order dismissing the suit and ending the receivership, the reasons assigned were the three reasons enumerated above as a, b, and c.

There is no allegation or appearance of improvidence or mistake as to an order dismissing and so far as showing cause why such an order should not be made, no one was required to show such mistake or improvidence.

In substance then, and as far as an order dismissing was concerned, the complainant was, in effect, called upon only to show that the allegations of the complaint were sufficient to sustain a receivership action.

It is, and was at the hearing, the contention of appellant that the allegations were sufficient.

The reasons for the final order of the court as enumerated in its decision accompanying the order were in substance:

a. That the bill of complaint is wanting in equity; (Assignments of Error 1, 2, 3, 4, 6, 7 and 8).

b. That the consent of defendant is insufficient; (Assignment of Error 5).

c. That the cause is sham, not bona fide and genuine litigation, lacking in good faith,

collusive and for a small amount (Assignments of Error 5, 9, 11, and 12).

The appellant contends that:

a. The bill of complaint is not wanting in equity.

In order to confer jurisdiction upon the court in such a suit as this, the complainant must set forth certain facts.

(1) Diversity of citizenship and corporate existence.

Complainant was a resident of Illinois. Defend- was a Minnesota corporation with property in Montana.

(2) A jurisdictional amount.

The statute requires that the amount in controversy shall exceed $3,000.00. The claim of complainant was $6,500.00, and although this amount and the fact that the action is brought for the benefit of all creditors gives rise to sarcastic comments in the decision of the court, the fact remains that the action is so brought and redounds for the benefit of such creditors. The amount of complainant's claim is substantially in excess of the jurisdictional amount required.

(3) Description of the property.

The properties of the defendant company so far as known to plaintiff were adequately described so that they could be identified.

(4) Showing as to inadequacy of legal remedies and the applicant's right or interest.

The appellant in this case is a general creditor; the procedure is what is commonly called a consent proceeding wherein the defendant appears by its attorney and files its answer admitting the allegations of the complaint.

The rule in such cases is stated in Foster's Federal Practice, Sec. 302-a, p. 1486, to be that a court will appoint receivers of a corporation

> "At a suit of unsecured creditors where the corporation makes no defense and waives the right to require complainants to reduce their claims to judgment, upon proof that the corporation is insolvent, that unless the court interferes its business will be interrupted by levy of judgments and executions. . . ."

Now that which was formerly considered the essential thing, the judgment, is unnecessary, unless the corporation objects.

The foregoing rule is well settled in the Federal courts by the following cases:

In re Reisenberg, 208 U. S. 90;

Hollins vs. Brierfield, 150 U. S. 371-380;

Central Trust Co. vs. McGeorge, 151 U. S. 129;

Brown vs. Lake Superior Iron Co., 134 U. S. 530;

Reynes vs. Dumont, 150 U. S. 354;

Am. Can Co. vs. Erie Preserving Co., 171 Fed. 540, 183 Fed. 96;

Guarantee Trust Co. vs. Int. Steam Pump, 231 Fed. 594;

These cases hold that if the suit is commenced by a simple contract creditor the objection, if any, as to complainant having an adequate remedy at law must be taken *in limine,* and if not so taken is waived.

The language of *Brown vs. Lake Superior Iron Co., supra,* is as follows:

> "But were it conceded that the bill was defective; that a demurrer must have been sustained; and that the appellant if it had so chosen to act in the first instance could have defended its possession and defeated the action, still the decree of the circuit court must be sustained. Whatever rights of objection and defense the appellant had it lost by inaction and acquiescence. Obviously the proceedings had were with its consent. Immediately on filing the bill it entered its appearance and the same day a receiver was appointed without objection on its part."

And in *Hollins vs. Brierfield, supra,* it was said that while a simple contract creditor of an insolvent corporation

> "cannot come into a court of equity to obtain the seizure of the property of their debtor and its application to the satisfaction of their claims," nevertheless "defenses existing in equity suits may be waived . . . and when waived the cases stand as though the objection never existed. . . . "

> "If there was a defense existing to the bills as framed, an objection to the rights of these plaintiffs to proceed on the ground that their legal remedies had not been exhausted, it was a defense and objection which must be made *in limine* and does not of itself oust the court of jurisdiction."

And as to the objection that the plaintiff was a simple contract creditor the rule was stated in *In re Reisenberg, supra,*

> "It is also objected that the Circuit Court had no jurisdiction because the complainants were not judgment creditors but were simply creditors at large of the defendant railways. The objection was not taken before the Circuit Court by any of the parties to the suit, but was waived by defendant consenting to the appointment of the receivers and admitting all the facts averred in the bill. . . . That the complainant has not exhausted its remedy at law—for example, not having obtained any judgment, or issued any execution thereon—is a defense in an equity suit which may be waived, as is stated in the opinion, in the above case (*Hollins vs. Brierfield*) and when waived the case stands as though the objection never existed. In the case in the Circuit Court the consent of the defendant to the appointment of the receivers, without setting up the defense that the complainants were not judgment creditors who had issued an execution which was returned unsatisfied in whole or in part, amounted to a waiver of that defense."

In the case at bar, the defendant appeared both in Minnesota and in Montana by its attorney, and filed its answer admitting the allegations of the bill,

and it has never at any time since appeared and objected. The objection therefore as to the fact that the complainant was a simple creditor who had adequate remedy at law was waived at the commencement of the proceedings, and remains now in that status.

In considering the rule that in equity there must be a showing that there is no adequate remedy at law, we would call attention to the fact that in determining the question, the adequacy of the legal remedy must be considered. The rule in that regard is well recognized, as stated in *Williams Federal Practice* (2d Ed), that "Generally speaking, in order to exclude a concurrent remedy in equity, the remedy at law must be as complete, as practical and as efficient to the ends of justice and its prompt administration as the remedy in equity." *Boyce vs. Grundy,* 3 Peters 210, 215; *Trade Dollar Consolidated Mining Co. vs. Fraser,* 148 Fed. 585, 593.

And a bill is not insufficient because it does not show the plaintiffs have exhausted their legal remedies it appearing that such remedies are inadequate or would be ineffectual or that the appointment of a receiver is necessary to preserve the property or fund, or to secure justice to the parties.

Heavilon vs. Frankfort Bank, 81 Ind. 249;

Chicago Ry Co. vs. Kenney, 159 Ind. 72;

Columbia Sand Dredge Co. vs. Washed Bar, 136 Fed. 710;

In the present case the allegations of the bill demonstrate, when considered and analyzed, that to relegate the complainant here to his remedy at law, would have obliged him to resort to a remedy which would have been wholly futile and inadequate. This is apparent from a consideration of those allegations which set forth the condition of the company's affairs. For the sake of brevity and to avoid repetition the conditions referred to will be considered under the next heading.

(5) Necessity of appointment.

The allegations of the complaint setting up the condition of the company affairs and whereby the necessity for the appointment is demonstrated, as well as the inadequacy of complainant's legal remedy are, we believe, quite full, and more than sufficient to establish such a necessity. It must be borne in mind that all such allegations stand uncontradicted on the record, and that the decree of the Minnesota court is evidence that the corporation is insolvent and that a proper case exists in that State for the appointment of receivers.

To enumerate such allegations:

1st. It is alleged that there was a large amount of indebtedness, to-wit:

Bonded indebtedness, $506,200.00, of which $115,000.00 was past due;
General Creditors, $76,000.00, all past due;
Notes, $75,000.00, part past due and balance shortly to mature;

and in addition there was interest on bonds very shortly to mature.

In this connection appellant would call attention to the fact that the preliminary report of the receivers which sets out in detail the actual condition of the accounts was before the court at the time of the making of its order dismissing and is a part of the record herein. That report shows:

Bonded Indebtedness $507,250.00, as alleged in complaint;

General Creditors over $79,000.00, as alleged in complaint;

Notes $76,000.00, of which $61,000.00 was past due;

Interest falling due in July, 1927, approximately $14,000.00.

2nd. It is alleged that the assets of the company were:

Mining properties estimated at	$8,500,000.00
Personal property at Butte	50,000.00
Personal property at Duluth	100,000.00

Of the foregoing the mining properties are not available to meet the current obligations of the company. Reference is made to the receivers' report which shows that the personal property at Duluth alleged as worth $100,000.00 consisted of capital stock in certain mining corporations holding the title to certain mining claims. Such stock was not marketable and of no practical value to the company in meeting its current obligations. The receiv-

ers' report (Exhibit C) further shows that the company at the time of the receivership had

Cash on Deposit	$613.99	
Subject to outstanding checks	178.75	$ 434.44
Accounts Receivable		26,082.59
		26,517.03

and of the Accounts Receivable so listed $24,273.79 was due from one of the company's largest creditors to which it at the time owed a total of over $42,000; in short, that the net available quick assets were $2,243.24 ($26,517.03—$24,273.79) with which to meet

Past due bonds	$115,000.00
Past due and shortly maturing notes	76,000.00
Balance of Accounts Payable of over	55,000.00
Shortly maturing bond interest of over	13,000.00
	$259,000.00

and in addition, that the company had outstand-standing bonds aggregating over $391,000.00 which might shortly be in default for non-payment of interest.

3rd. It is alleged that various creditors are pressing their claims and that actions at law may be instituted, judgments and executions be obtained and inequitable preferences result. Further, that irreparable injury will be done complainant and other creditors, beside stockholders, that the good will of

defendant will be lost, its ability to eventually proceed destroyed and the value of its properties irreparably impaired. It is further alleged that there are a large number of creditors.

4th. It is alleged that defendant is without funds to meet its obligations past due and shortly to mature, and is unable to borrow the money necessary; that it has failed in its efforts to sell its bonds.

It is the contention of the appellant that the foregoing allegations and facts are more than sufficient to bring the complainant within the rule justifying a receivership, and that to ignore the same and dismiss the suit is error.

In *Cincinnati Equipment Co. vs. Degnan,* 184 Fed. 834 (C. C. A. 4th Cir.) and cases cited, it is held the inability of a corporation to pay its current obligations as they mature in the ordinary course of its business constitutes insolvency in a general sense, which will authorize the appointment of a receiver by a court of equity in a creditors' suit, and that a bill against a corporation sufficiently alleges insolvency when it alleges facts from which such condition may be naturally and reasonably deduced.

In *Durand vs. Howard & Co.,* 216 Fed. 585, which was a suit where the defendant company had assets largely exceeding its liabilities but did not have money to meet its obligations as they fell due and could not borrow, the court said:

> "The power of a court of equity to appoint a receiver has long been recognized as one of as great utility as any which belongs to the court. It is exercised to prevent fraud, or to save the subject of litigation from material injury or to rescue it from inevitable destruction. A receiver is appointed when it appears necessary to do so to preserve the property and give adequate protection to the rights of the parties interested in it. . . . The intention was to prevent injury to creditors by a slaughter of the assets through forced sales, and also to prevent a preference among creditors. . . . They (the receivers) have been put into the possession of this property because the interests of justice can in this way be best secured."

It would seem that the duty of the court in each case must, to a degree, depend upon the showing therein. In the instant case, appellant contends that a great necessity was shown. Here was a company with frozen assets in the form of mining properties, matured debts of over $246,000.00 interest to the amount of over $13,000.00, falling due in a few days, and to meet this load it had of available Accounts Receivable and in cash slightly over $2,200.00. Under such circumstances, it would appear that the actions of Judges Cant and McNary were dictated by a wise discretion, and a just regard for the welfare of the stockholders of defendant company, as well as its creditors and bondholders. That certainly the allegations were entirely sufficient to justify them in their action, and that such action should not be

subject to reversal on the same record at the instance of another judge of co-ordinate jurisdiction.

B. The answer and consent of the defendant company is sufficient (Assignment of Error 5).

As has been stated this action was and continues to be what is commonly called a friendly receivership or consent proceeding. In the decision of the lower court the fact that the consent of the company to the appointment of the receivers was signed by the secretary is referred to "as sham and void upon its face in that a corporate secretary has no authority to thus displace the officers and management chosen by stockholders and to thus pave the way for corporate death."

This is a finding that the secretary did not have authority and that he displaced the officers and management, and yet there is nothing whatever in the record to support such a finding. The defendant company nor its creditors, nor any interested party has made any such assertion, nor have any affidavits or proof thereof been submitted.

Neither has the complainant been called upon or required to make proof thereof. The order to show cause herein did not mention the answer or consent, and did not give any notice to the complainant that they were called in question.

On the record, therefore, appellant contends that there is no justification for a finding of "sham"

with relation to the consent or any other pleading or for a finding of lack of authority.

The only question proper to raise with reference thereto would be as to the effect of an answer or consent of a defendant company signed by its secretary and signed and presented by its solicitor where such pleading is not repudiated or attacked by the litigant or an interested party.

In the primary suit the defendant appeared by its solicitor and filed its answer and consent. In the ancillary suit it also appeared by another solicitor and filed its answer. The lower court now takes the position that none of these pleadings are valid. If they are valid there is no question that all objections on the ground of adequate remedy at law and simple contract creditor are waived.

See the cases above cited.

As to the worth of these pleadings and the validity thereof:

We call attention to the fact that the lower court in its decision tacitly admits that they are sufficient, for immediately before declaring them "sham and void" it is stated "In so far as defendant's consent is relied upon and *might serve,* be the court amiable and ambitious to embark upon a mining venture, etc." This can be construed only as an admission that if a court saw fit it might accept such pleadings as a basis for such a suit. But we respectfully sub-

mit that if the pleading was not sufficient, a court could not accept it, whether the court was "amiable" or otherwise.

Further, it is to be noted that in the decision of the court immediately following its statement with reference to the secretary, the court says:

> "Passing that, however, the complaint is altogether wanting in substance, etc."

indicating again that the lower court recognized the fact that the objection thus stated was of no weight.

It is the contention of appellant that any question as to the authority of the secretary is entirely beside the point. That as far as forming a basis for dismissal of the action whether the secretary was authorized or not, or whether the defendant signed a consent or not is entirely immaterial.

For it is the position of appellant that the pleadings by defendant herein are sufficient and of binding force and effect.

That a pleading of a party signed by its solicitor is a valid pleading and the act of the party.

As to the effect of the appearance of a party by its solicitor and the pleadings signed by him, Equity Rule No. 24 provides that

> "Every bill or other pleading shall be signed individually by one or more solicitors of record and such signature shall be considered as a certificate by each solicitor that he has read the pleadings so signed by him; that upon the in-

structions laid before him regarding the case there is good ground for the same; that no scandalous matter is inserted in the pleadings and that it is not interposed for delay."

In this case we do not, in any event consider the "consent" as at all vital. It is the answer which is the important pleading, for it is by the answer, and not by the consent to the appointment of certain receivers, that the defendant waives what objection it may have to the bill.

If in any case the defendant saw fit to sign its answer by an officer, even though no affirmative showing was made as to that officer's authority, if the answer was also signed by its solicitor, it is sufficient.

To hold that a party represented in court by its solicitor, who files his pleading signed by such solicitor, has performed an act which is "void" and a nullity, is to abrogate entirely the effect of the Equity Rule cited.

C. *The cause is not sham, is not lacking in bona fides, is genuine litigation, is not collusive, and the amount of complainant's claim is not a fact properly to be considered.* (Assignments 5, 9, 11 and 12.)

Again for the purposes of condensation the foregoing assignments are grouped. They are properly so grouped, we believe, for they all arise from similar statements appearing in the decision of the lower court. They amount to findings to that effect. The

answer to all such findings is the same. That is, there are no allegations in the pleadings and absolutely no facts in the record upon which the lower court could find

a. That the defendant's consent is sham.
b. That the complaint is unreliable.
c. That in no just sense is there insolvency.
d. That the allegations of the bill relative to threatened suits were made in excuse of complainant's precipitancy.
e. That there was a race to be first for the emoluments of a receivership.
f. That this is not genuine and bona fide litigation.
g. That the suit lacks good faith.
h. That the suit is obviously collusive between an amiable creditor and quasi "dummy" plaintiff and a faction of the corporation.
i. That the suit is designated to "gain some inequitable advantage and to accomplish some ulterior purpose.
j. That Kennedy or the defendant virtually dictated whom the courts should appoint for their own hand, etc.
k. That coercion was used toward the courts.
l. That there is no equity by reason of the small amount of plaintiff's claim.

Appellant claims that such statements as the foregoing, when no foundation therefor appears in the record, are totally uncalled for and unwarranted. What showing is there, and upon what can the court base a finding that this complaint is not filed in good faith, that it is not bona fide litigation,

that it is not genuine litigation, that the allegations of the bill were made in excuse of plaintiff's precipitancy to be first in a race for the emoluments of a receivership? What showing is there that there was any "race"? What showing is there that plaintiff is a "dummy" and that the suit is between plaintiff and a faction of the corporation to gain an inequitable advantage and for some ulterior purpose?

There is absolutely nothing in the record to support such assertions and, if there were, if such contentions were made, we submit that plaintiff would be entitled to his day in court, to refute them. It is wholly impossible, however, for any litigant to dispute facts which are not shown, and thoughts and ideas which are not at issue.

What evidence is there that the courts have been "coerced" or been "virtually dictated" to? Such a statement is so obviously unfounded that it needs but the repetition to emphasize its absurdity. With reference to it we merely wish to have it understood that the reflection upon the Federal courts contained therein does not emanate from counsel.

With reference to the remark concerning the amount of plaintiff's claim, we would repeat what has been before stated herein. To hold that the right to relief is at all governed by the size of a claim, so long as it meets with the jurisdictional requirements

is a new and startling doctrine, and we are inclined to the belief that if it is to be held that a party with a large claim is entitled to relief and a party with a small claim is not, it would be very persuasive in inciting "the storms of judicial recall which persistently lower along the political horizon," although we must confess to an inability to perceive what bearing such storms have upon this or any other cause of action.

As to the finding that this cause is "obviously collusive." It is probable that this arises from the fact that the case is what is commonly known as a friendly receivership. However, the fact that when action in receivership is brought, the defendant acquiesces and joins therein does not establish collusion. Friendly receiverships are a very common form of proceeding and highly conducive to proper protection of all parties concerned, stockholders as well as creditors. Such receiverships have been repeatedly recognized, and the fact of their non-collusive character is well established.

In *Atwater vs. Community Fuel Corporation,* 291 Fed. 686, 688, the court said:

> "With respect to the charge of collusion, I do not understand that in an action in equity brought against a corporation for the purpose of conserving its assets, the consent and approval of the defendant is such collusion as is forbidden by the courts. The theory of such an action in equity is that the defendant will co-

> operate in an honest attempt to conserve the assets for proper distribution among the creditors."

In re Reisenberg, 208 U. S. 90, 52 L. Ed., 403, 412, it was asserted that there was collusion between the complainants and the street railway companies, but the court found no evidence of collusion. Here, as in the Reisenberg case, it does appear that the parties to the suit desired that the administration of the company's affairs should be taken in hand by the United States District Courts of Minnesota and Montana, and to that end, when the suit was brought, the defendant admitted the averments of the bill, and united in the request for the appointment of receivers. But there is nothing in the record to show that the averments in the bill were untrue, or that the debt named in the bill as owing to complainant did not exist; nor is there any question as to the citizenship of complainant and defendant, and there is nothing in the record to indicate that any fraud was practiced for the purpose of thereby creating a case to give jurisdiction to the Federal courts. As was said in the *Reisenberg* case,

> "That the parties preferred to take the subject-matter of the litigation into the Federal courts, instead of proceeding in one of the courts of the state is not wrongful. So long as no improper act was done by which the jurisdiction of the Federal court attached, the motive for bringing the suit there is unimportant."

See also

Burton vs. Peters, etc., Co., 190 Fed. 262, 265;

Guaranty Trust Co. vs. Int. Steam Pump Co., 231 Fed. 594, 603-4.

Upon all the foregoing, appellant respectfully submits that the lower court erred in entering its order from which this appeal is taken.

Respectfully submitted,

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